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Supreme Court, U.S.
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No. 97-0604

In The

Supreme Court of the United States

October Term, 1997

MURAT M. TANIK,

Petitioner,

v.

SOUTHERN METHODIST UNIVERSITY AND JEFF KENNINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Counterstatement of the Question Presented

1. Whether Petitioner is correct in claiming the Fifth Circuit did not follow the *McDonnell Douglas Corp. v. Green* burden-shifting analysis in this particular case.

List of Parties to Proceeding Pursuant to Rules 14.1(b) and 29.6

Pursuant to Supreme Court Rule 14.1(b), Respondents certify that the names of all parties to this proceeding appear in the caption of the Brief of Respondents.

Pursuant to Supreme Court Rule 29.6, Respondents certify that Southern Methodist University does not have any parent companies or nonwholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Southern Methodist University ("SMU") and Jeffery Kennington ("Kennington") respectfully request that this Court deny Murat Tanik's ("Tanik") petition for writ of certiorari seeking review of the Fifth Circuit's judgment reported at 116 F.3d 775 (5th Cir. 1997).

STATEMENT OF JURISDICTION

Petitioner Murat Tanik asserts jurisdiction pursuant to 28 U.S.C. § 1254. However, the decision of the court of appeals creates no conflicts in the law and does not meet the criteria of Supreme Court Rule 10 for granting a writ of certiorari.

STATEMENT OF THE CASE

Tanik's "Statement of the Case" is an exercise in advocacy advancing an unfounded version of the "facts." Often, Tanik's "facts" are simply wrong; Tanik's overall presentation is selective and misleading. SMU and Kennington offer the following brief summary of the undisputed facts:

A. Factual Background

This is a race and national origin discrimination case that involves a tenure decision by a university. Tanik, who was born in Turkey, claims that SMU discriminated against him because of that fact in denying him tenure. A

main problem with Tanik's case is his failure to produce any evidence that any of the academicians at SMU or the academic reviewers from outside the University who judged his case discriminated against him because he is Turkish. SMU treated Tanik more than fairly by giving him every chance to present every fact bearing on his case, and after Tanik raised procedural questions even re-reviewed his tenure case. Furthermore, two Turkish professors who taught at SMU, in the same engineering school as Tanik, received tenure the same year Tanik's tenure deliberations began. Tanik simply was not qualified for tenure at SMU and therefore SMU did not grant him tenure.

Tanik began teaching at SMU in 1987. Tanik was an untenured probationary Associate Professor in SMU's Computer Science and Engineering ("CSE") Department in the School of Engineering and Applied Science ("SEAS") from 1987 until he left SMU. Defendant Kennington was chair of the CSE Department when Tanik was considered for tenure during academic year 1992-93, at the end of SMU's (and academia's) standard six year probationary period.[1]

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[1] Tanik attempts to compare his case to that of Professor Dunham. (Tanik refers to this professor by her maiden name, which is "Eich." Respondents refer to her as "Dunham," the married name she now uses.) Tanik did not include in the summary judgment record Dunham's complete tenure case and, therefore, it is impossible to compare his case to hers. Instead, Tanik focuses on minutia when giving anecdotal examples of differences in the way in which his case was handled compared to hers; none of these differences were substantive and none indicate discrimination on the part of Kennington or anyone else.

Tanik claimed procedural irregularities in his case and was allowed to have his tenure case re-reviewed the following academic year. Neither racial nor ethnic discrimination was *ever* alleged by Tanik or anyone else at this or any other stage of the tenure proceedings. When Tanik's case was reconsidered, everything that Tanik wanted included in his dossier was included. The provost determined that Tanik's case did not merit a grant of tenure. The provost chose not to grant tenure because of weaknesses in Tanik's teaching, research, and publications.[2] Tanik appealed this decision to the President of SMU; the President denied Tanik's appeal. Tanik admits that neither the provost nor the president – the ultimate decision-makers – discriminated against him.

Although Tanik complains of discrimination based on his "race" and national origin, Tanik presented no evidence of discrimination against him due to his Turkish background. Instead, he attempts to seize upon every supposed implication he thinks he sees in any unrelated comment *not* made about Tanik, but made about other individuals who are *non*-Turkish, and stretches them to

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[2] This was consistent with observations made by Tanik's outside reviewers, including outside reviewers chosen by Tanik. Contrary to Tanik's assertions in his petition, many of his outside reviewers questioned the quality of his journal publications. One outside reviewer selected by Tanik, who was in a similar area of research as Tanik, wrote that of Tanik's nine journal papers he had not heard of seven of the journals. Of Tanik's conference papers, he wrote that the majority were either from conferences where almost all papers are accepted, or from conferences of which he had never heard. Some of Tanik's outside reviewers said that Tanik would not receive tenure at their institutions.

the farthest limit, and then draws dubious conclusions from these unrealistic interpretations. Tanik also never addresses the fact that in the year tenure deliberations began for him, two professors in SEAS who were of Turkish national origin were awarded tenure. Tanik simply has offered no evidence of discrimination against anyone, and certainly not against Turks. The reason Tanik did not receive tenure at SMU was that he was not a compelling tenure candidate; discrimination played no part in the university's decision. The record is devoid of any evidence of intentional discrimination against Tanik because he is Turkish.

B. Court Proceedings Below

Tanik sued SMU and Kennington pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 *et seq.*, 42 U.S.C. § 1981, 42 U.S.C. § 1985, and 42 U.S.C. § 1986. He also brought claims under the Texas Commission on Human Rights Act, Texas Labor Code § 21.001, *et seq.* Finally, Tanik attempted to advance a conspiracy theory under Texas common law. SMU and Kennington filed a motion for summary judgment on all of Tanik's claims. The district court granted the motion. Tanik appealed to the Fifth Circuit and the Fifth Circuit affirmed the district court's judgment and denied rehearing and rehearing en banc.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AND THERE IS NO SOUND REASON TO GRANT CERTIORARI.

The standard by which this Court determines whether to grant a petition for writ of certiorari is whether there are "compelling reasons" for granting the writ. Sup. Ct. R. 10. Tanik's argument for "compelling reasons" is based on a misstatement of the Fifth Circuit's opinion, and a distortion of the case law to try to create a conflict between the circuits, when none exists.

A. The Fifth Circuit's decision does not conflict with this Court's decision in *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990).

Applying the traditional burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Fifth Circuit found that Tanik did not present evidence of discrimination against him and that SMU articulated a legitimate, nondiscriminatory reason for not granting him tenure. Ignoring these findings, Tanik casts the Fifth Circuit's decision as one turning a blind eye to discrimination and withdrawing all judicial scrutiny of academic tenure decisions. This is not what the court's decision says or does. The Fifth Circuit's decision is entirely unremarkable; it properly follows the standards set out by this Court in reviewing Title VII cases.

Tanik miscites this Court's holdings. Despite Tanik's erroneous protestations to the contrary, this Court did not

reject all limitations on judicial scrutiny of tenure decisions by universities in *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990). *University of Pennsylvania* was a discovery case. Tanik's case is *not* a discovery case. In *University of Pennsylvania*, this Court held that the EEOC was entitled to obtain peer review materials used in evaluating tenure candidates by the university. *University of Pa.*, 493 U.S. at 201-02. This Court did not reach the merits of the underlying discrimination and tenure issues in *University of Pennsylvania* because those issues were not before the Court. The discovery of peer review materials is not an issue in Tanik's case. SMU produced peer review materials to Tanik during discovery.

Nonetheless, *University of Pennsylvania* is instructive because in fact it does recognize the role of academic judgment in making tenure decisions:

> In keeping with Title VII's preservation of employers' remaining freedom of choice, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), courts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned that 'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.' *Regents of University of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decision making.

493 U.S. at 199 (emphasis in original). It is incorrect to say (as Tanik does) that this Court "strongly denounced"

granting any deference to universities in making their tenure decisions in *University of Pennsylvania*. Tanik simply misstates the holding in *University of Pennsylvania* when he asserts that this Court "reject[ed] any limitation on judicial scrutiny under Title VII of tenure decisions by universities." (Pet. i).

Because Tanik did not present *any* evidence of racial or national origin discrimination against him, and because SMU articulated a legitimate, non-discriminatory reason for its decision, SMU's decision not to grant Tanik tenure should not be disturbed, as the Fifth Circuit held. This is simple Title VII analysis, and certainly does not contradict this Court's decision in *University of Pennsylvania*.

B. The Fifth Circuit's decision is not inconsistent with decisions in the other circuits.

Contrary to Tanik's representations, the Fifth Circuit's decision does not create some new rule of law at variance with the rules announced in other circuits, nor does it violate Title VII.[3] Tanik implies that the Fifth Circuit found that discrimination is tolerable in an academic setting. (Pet. 2). The opinion says no such thing.

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[3] The Fifth Circuit continues to follow the precedent announced by this Court and continues to properly analyze Title VII cases. For example, since it decided Tanik's case, it has decided *Travis v. The Board of Regents of the University of Texas System*, 122 F.3d 259 (5th Cir. 1997) in which it again in an entirely normal fashion applied the proper burden shifting analysis it applied in Tanik's case.

Tanik's implausible position is controverted by the opinion itself, which, on its face, recognizes that "Tenure decisions are not, however, exempt from judicial scrutiny under Title VII." 116 F.3d at 776.

The Fifth Circuit's decision, in fact, is consistent with the decisions cited by Tanik. Tanik claims that the Fifth Circuit's decision is inconsistent with decisions in the First and Third Circuits. However, the Fifth Circuit cited for authority an opinion from the First Circuit in support of its decision: *Kumar v. Board of Regents, Univ. of Mass.*, 774 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986). Moreover, one of the First Circuit cases cited by Tanik (allegedly in support of his position) strongly supports the position that absent discrimination, academic decisions should be accorded deference. *See Brown v. Trustees of Boston Univ.*, 891 F.2d 337 (1st Cir. 1990), *cert. denied*, 496 U.S. 937 (1990). In *Brown*, the First Circuit court quoted:

> [C]ourts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding the applicant's academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement. Absent discrimination, a university must be given a free hand in making such tenure decisions.

Id. at 346 (quoting *Kumar*, 774 F.2d at 12 (1st Cir. 1985) (Campbell, C.J., concurring)).

Similarly, the Fifth Circuit's decision is consistent with decisions of the Third Circuit. Tanik cites *Roebuck v. Drexel University*, 852 F.2d 715 (3d Cir. 1988). The *Roebuck*

court, however, wrote that courts "do not sit as a super tenure review board." *Roebuck*, 852 F.2d at 731. Tanik also relies on *Bennun v. Rutgers State University*, 941 F.2d 154 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 956 (1992). Tanik, however, neglects to include this sentence, which immediately follows the section that he does quote on page 14 of his petition: "We did, however, caution courts not to 'substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure.' " *Bennun*, 941 F.2d at 174 (quoting *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980)). The Fifth Circuit is not in conflict with the Third.

No split of authority exists in the circuits, and thus no reason justifies granting Tanik's petition for certiorari. This Court has held "it is very important" that it be consistent in not granting certiorari in conflict situations except "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)). That is not the case here, and for this reason alone the Court should deny the petition.

II. TANIK MISINTERPRETS THE BURDEN-SHIFTING ANALYSIS USED IN TITLE VII AND SECTION 1981 CASES AND THUS IMPROPERLY SUGGESTS THAT THE FIFTH CIRCUIT'S OPINION VIOLATED RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Tanik claims that the Fifth Circuit improperly applied Rule 56 of the Federal Rules of Civil Procedure in denying his appeal of the summary judgment entered against

him. He says he was entitled to a trial because he claims he proved his prima facie case. This is a misstatement of the law. Tanik confuses proving the elements of a prima facie case (which often is not difficult to accomplish) with presenting enough evidence to avoid summary judgment.

Tanik apparently misunderstands the burden-shifting analysis promulgated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and further discussed in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and their progeny. In those cases, the Court enunciated the now familiar analysis of the plaintiff proving a prima facie case, the defendant articulating a legitimate, nondiscriminatory reason for the employment decision, and the plaintiff then attempting to prove this reason pretextual while simultaneously retaining the burden of proving intentional discrimination. *St. Mary's Honor Ctr.*, 509 U.S. at 506-08; *McDonnell Douglas*, 411 U.S. at 802-04. What Tanik does not recognize is that once the defendant articulates a legitimate, nondiscriminatory reason for its employment decision, any presumption raised by the plaintiff in proving his prima facie case is "rebutted" and "drops from the case." *St. Mary's Honor Ctr.*, 509 U.S. at 507 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 & n.10 (1981)).[4]

Tanik accuses the Fifth Circuit of deviating from Rule 56 by rejecting the alleged adequacy of his summary judgment evidence which he says established his claim,

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[4] The evidence was so weak here that the district court expressed doubt as to whether Tanik even had proved a prima facie case.

(Pet. i)[5], and that the Fifth Circuit was wrong to grant summary judgment when he allegedly proved his prima facie case. (Pet. 11-12). It is this supposed error that Tanik claims makes his case certworthy. (Pet. 11-12). Tanik asserts that Rule 56 "entitles a plaintiff to a trial when he offers evidence raising a prima facie case" and that the circuit court violated this rule as well as *St. Mary's Honor Center* in denying him a trial. (Pet. 12). Such an argument is clearly unsupported by the rule and by the case law. Instead, the Fifth Circuit correctly applied the law when it said that "the presumption raised by the plaintiff's prima facie case essentially disappears [after the defendant articulates a legitimate, nondiscriminatory reason for the employment decision], and the plaintiff is left with the ultimate burden, which has never left him: that of proving that the defendant intentionally discriminated against him." 116 F.3d at 776 (citing *St. Mary's Honor Ctr.*, 509 U.S. at 509-12). This Court has never held that plaintiffs are entitled to a trial after merely proving a prima facie case of discrimination.

The Fifth Circuit's decision and application of the law do not violate Rule 56 or the case law established by this Court. The real thrust of Tanik's argument is that he disagrees with the Fifth Circuit's decision, and nothing more. Tanik presents no reasons, much less "compelling reasons," to grant certiorari, and his writ should therefore be denied.

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[5] In fact, Tanik presented no evidence of discrimination against him and therefore his evidence was far from adequate.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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